OFFICE SUPREME COURT U.S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

The Interstate Commerce Commission,

Appellant,

v.

The Louisville and Nashville Railroad Company, The Western Railway of Alabama, and The Atlanta and West Point Railroad Company.

No. 214.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

PETITION FOR REHEARING.

The Interstate Commerce Commission, appellant in the bove-named case, respectfully petitions the court for a vaca-ion of the decree therein made May 18, 1903, and for a ehearing thereof on the following grounds:

1. This court bases its decision in this case solely upon the estimony and issues in the case before the Commission and he rulings of the Commission in that case, and makes no eference whatever to the testimony taken and the pleadings led in the present case in court.

2. **The case in court an original and independ-nt proceeding based on new pleadings and new r additional testimony.**

Section 16 of the "act to regulate commerce," under hich this case was instituted, requires the courts "to hear nd determine these cases speedily as courts of equity, and ithout the formal pleadings and proceedings applicable to rdinary suits in equity, but in such manner as to *do justice* n the premises," and that the courts "*shall have power, if hey think fit, to direct and prosecute, in such mode and by uch persons as it may appoint, all such inquiries as the court ay think needful to enable it to form a just judgment in he matter.*"

Under this last provision, which is italicized, a large amount f new testimony was taken by order of the court in behalf f both the complainant and the carriers, and new pleadings, bill of complaint and answers thereto, were filed in court.

It is settled that in a proceeding before the courts to enforce orders of the Commission, the matter is heard *de novo* and the proceeding is "an original and independent proceeding" based on new pleadings and new evidence and that it is the duty of the courts to "do justice as courts of equity *upon the entire body of the evidence.*"

Social Circle case (56 Fed. Rep., 934, 935).
I. C. C. v. *C. N. O. & T. P. Ry. Co. et al* (64 Fed. Rep., 984, 985).
Shinkle, Wilson & Kries Co. et al. v. *L. & N. R. R. Co.* (62 Fed. Rep., 693).
I. C. C. v. *Ala. Mid. Ry. Co.* (168 U. S., 175).

In the *Alabama Midland case* (168 U. S., 175) this court says:

"It has been uniformly held by the several circuit courts and the circuit courts of appeal in such cases that they are *not restricted to the evidence adduced before the Commission* nor to a consideration merely of the power of the Commission to make the particular order in question, but that additional evidence may be put in by either party, and that *the duty of the court is to decide as a court of equity upon the entire body of the evidence.*"

3. **Testimony in case in court.**

This court states in its opinion in this case that "the evidence introduced at the hearing *before the Commission* in support of the complaint consisted solely of the testimony of the complainant," and that "much evidence—both oral and documentary—was introduced in behalf of the railroads."

In the case in court there were introduced in behalf of complainant the depositions, with exhibits attached, of the following witnesses:

Jesse M. Smith, Record, pp. 251–268.
Fuller E. Calloway, Record, pp. 281–287.

E. R. Bradfield, Record, pp. 289–293.
D. A. Dansby, Record, pp. 295–298.
T. S. Bradfield, Record, pp. 300–303.
H. H. Childs, Record, pp. 305–309.
T. J. Harwell, Record, pp. 310–314.
J. E. Dunson, Record, pp. 315–319.
J. H. Edmondson, Record, pp. 321–324.
W. V. Gray, Record, pp. 326–330.
B. H. Seay, Record, pp. 331–335.
M. L. Fleming, Record, pp. 337–340.
H. D. Glanton, Record, pp. 341–346.

There was also introduced in the case in court in behalf of the complainant a number of stipulations setting forth tariffs of rates for the purpose of showing by comparison the excessiveness of the Lagrange rates.

Record, pp. 244–247.

4. **Testimony in court bearing upon reasonableness of Lagrange rates.**

This court in its opinion holds that "there was nothing in the evidence *taken before the Commission* to lend support to the finding that the rates to Lagrange were intrinsically unreasonable."

The Commission mentions in its report a number of facts which, *in its opinion*, tended to show the unreasonableness of the Lagrange rates.

There was evidence INTRODUCED IN COURT in behalf of the complainant tending to show the unreasonableness of the Lagrange rates, among which may be mentioned the following:

(*a*) The Standard Freight Tariff established by the Georgia Railroad Commission, showing rates for a distance of 424

miles, the distance from New Orleans to Lagrange, more than 30 per cent less than the Lagrange rates complained of.

(Record, pp. 245, 246.)

This Georgia Standard Freight Tariff is indorsed as a measure or standard of reasonableness in the answer of the carriers and in the testimony of their witnesses.

Paragraph XIII, answer; record, p. 20.

Answers of witnesses for carriers to interrogatory 5, record, pp. 370, 376, 391.

See original printed argument filed in this court, Chapter VII, pp. 29–31.

(*b*) Joint Freight Tariff of the Southern Railway Company (Southern system), I. C. C. No. 3910, showing rates for a distance of 424 miles, the distance from New Orleans to Lagrange, more than 30 per cent less than the Lagrange rates complained of.

Record, pp. 247, 248.

See printed argument filed in this case in this court, pp. 39–41.

(*c*) Local Freight Tariff No. 1047 (Western system) of the Southern Railway, applying on business in the States of Georgia and Alabama, showing rates for a distance of 424 miles, the distance from New Orleans to Lagrange, more than 30 per cent less than the Lagrange rates complained of.

Record, pp. 247, 248.

Printed argument filed in this court in this case, p. 40.

(*d*) Local Distance Tariff of the Illinois Central Railway Company (Southern lines) showing rates for a distance of 424 miles, the distance from New Orleans to Lagrange, more than 30 per cent less than the Lagrange rates complained of in this case.

Record, pp. 247, 248.

Printed argument filed in this court, p. 41.

(*e*) Statement of revenue per ton per mile of roads throughout the United State and roads in Georgia, Alabama, Mississippi, Tennessee, Florida, Kentucky, West Virginia, Virginia, North Carolina, and South Carolina, which revenue per ton per mile is only about one-fourth as great as the rates per ton per mile yielded by the Lagrange rates complained of.

Record, p. 244.

Printed argument filed in this court, pp. 24, 26.

(*f*) Proof that the Lagrange rates are not the lowest combination, the lowest combination being on Opelika and not on Atlanta.

Record, bot. p. 282, 332, 176.

Printed argument filed in this court, pp. 66–69.

There are numerous other grounds upon which it was contended in behalf of the Commission before the court that the Lagrange rates were excessive, among them the fact that, while the traffic from New Orleans was delivered at Lagrange, the Lagrange rates embraced the charge for the haul through Lagrange, 71 miles on to Atlanta, and a high local rate 71 miles back, an aggregate of 142 miles. *Printed argument filed in this court, pp. 47–50.*

5. The opinion of this court states that "the report of the Commission makes no reference whatever to any intrinsic disparity between the Lagrange rates and those prevailing at *other noncompetitive points.*"

(*a*) The suit in court being *de novo* and based on new testimony, the court is not limited to facts referred to in the report of the Commission.

(*b*) The Lagrange rates are higher than the rates to all the longer-distance noncompetitive points *between Lagrange and Atlanta*, and also than the rates to all noncompetitive points *between Lagrange and Opelika*, the latter being based on Opelika.

(*c*) THE LAGRANGE RATES ARE HIGHER THAN THE RATES TO ALL POINTS, BOTH NONCOMPETITIVE AND COMPETITIVE, AND WHETHER LAGRANGE BE THE SHORTER OR LONGER DISTANCE POINT, ON THE ENTIRE LINE FROM NEW ORLEANS TO ATLANTA, THE RATES REACH THEIR HIGHEST ALTITUDE AT LAGRANGE.

6. The Opelika Combination.

After the testimony had been closed and the case argued and submitted in both the circuit court and the circuit court of appeals, in both which courts counsel for the complainant had called attention to the fact that the Lagrange rates were not the lowest combination, the lowest combination being on Opelika and not on Atlanta, the case was practically reopened by the filing with a member of the circuit court of appeals of of a rate sheet giving Lagrange the Opelika combination.

It was contended in behalf of the complainant that this was an admission that the Lagrange rates were excessive to the extent of the difference between the Opelika and Atlanta combinations and that it sustained the first subdivision of the order of the Commission, which simply forbids the exaction of excessive rates.

It was further contended that this did not obviate the necessity of a decree in favor of the Commission enforcing the first subdivision of the order because, if the complainant's bill was dismissed without such decree, there was nothing to prevent the carriers from returning to the Atlanta combination.

Printed argument filed in this court, pp. 70–72.

In commenting on this contention, this court says:

"The reasoning has abstract force, but its application to the case in hand is devoid of merit, since neither in the complaint made before the Commission nor in the evidence introduced for the complainant was any claim made that wrong had been done because of a combination of rates based on Atlanta instead of Opelika."

(*a*) It was not necessary to allege either in the complaint before the Commission or in the complaint in court that the Opelika combination was the lowest. The complaints before

the Commission and in court alleged that the Lagrange rates were excessive or unreasonable in themselves, and in support of this allegation the complainant *made proof* that the Opelika combination was lower than the Atlanta combination.

It was not necessary to allege matters of evidence in the complaints.

(*b*) Moreover, the defendant carriers in their answers, both before the Commission and in court, allege that Lagrange had the choice of only the Montgomery and the Atlanta combinations, and that the Atlanta combination was the lowest.

Paragraph XII, answer before Commission, Record, pp. 17, 20.

Paragraph XVII, answer in court, Record, pp. 69, 72.

The issue as to the lowest combination was thus presented.

(*c*) The complainant introduced evidence that the Opelika combination was the lowest by making proof of the rates from Montgomery to Opelika and from Opelika to Lagrange.

Record, bot. p. 282, 332.

Printed argument filed in this court, p. 67.

(*d*) The fact that the Opelika combination was the lowest was called to the attention of the circuit court and the circuit court of appeals and this court by testimony, by oral argument accompanied by chart showing the Atlanta and Opelika combinations, and by printed argument.

Printed argument filed in this court, p. 67.

(*e*) The Opelika combination was not given to Lagrange until May 15, 1900, about six months after the case had been heard by the circuit court and decided in favor of the Commission.

We respectfully renew our contention that the action of the defendant carriers in giving Lagrange the Opelika combination, not only after the suit had been brought, but after the testimony had been closed and the case argued and submitted, and after counsel for the complainant had insisted that Lagrange was at least entitled to the Opelika combination, was an admission that the Lagrange rates were excessive to the extent of the difference between the Atlanta and Opelika combinations, and that this entitled the complainant

to a decree enforcing the first subdivision of the order of the Commission, which simply forbids the exaction of excessive rates, and that the dismissal of the Commission's bill of complaint without such decree leaves the defendant carriers at liberty to reinstate the rates originally complained of.

7. The opinion of this court in this case holds that that clause in the order of the Commission which forbids higher rates to Lagrange than to longer distance local stations, Hogansville, Newnan, Palmetto, and Fairburn, "makes it clear that no independent finding as to the unreasonableness of the rates was made, since it allows the carriers to continue to charge the rates complained of to Lagrange, provided that no higher rates were charged to the more distant points between there and Atlanta;" in other words, that that clause of the order is inconsistant with a finding that the rates were unreasonable.

(*a*) In the first place, the Commission *expressly finds* at the conclusion of its opinion that the Lagrange rates are in violation of section 1 of the law which forbids unreasonable rates. Record p. 48.

(*b*) In the next place, the second clause or subdivision of the order of the Commission is as follows:

"That said defendants and each of them cease and desist from charging, demanding, collecting, or receiving the following UNREASONABLE, UNJUST, AND UNLAWLUL RATES for the transportation from New Orleans to Lagrange of articles embraced in the various classes of their freight classification—that is to say:" (Here follow the Lagrange rates complained of.)

The different clauses or subdivisions of the order are to be construed together, and, construing the above clause with that forbidding higher rates to Lagrange than to Hogansville, etc., it must be held that the latter clause was intended to be complied with by reducing the Lagrange rates so as to make them not higher than the rates to Hogansville, etc.

(*c*) In the third place, as the proceedings before the court

are *de novo* and based on new testimony, it follows that *if the testimony before the court shows the unreasonableness of the rates, the court should find them to be unreasonable whether the Commission so found or not.*

If unreasonable, this calls for the enforcement of the first clause or subdivision of the order which simply forbids the exaction of unreasonable rates to Lagrange.

8. The proceedings in court being new and independent proceedings, based on new pleadings and new testimony, and the courts being required to "do justice" on the entire body of the testimony before them, an erroneous conclusion of the Commission from the facts should not prevent the enforcement of its order by the court if the testimony before the court justifies the order, or any part of it.

This was evidently the intention of the statute.

9. This court in its opinion states that "it was and is conceded that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta, and that there was hence such a dissimilarity of circumstances and conditions as justified the lesser charge for the carriage of freight from New Orleans to Atlanta, the longer distance point, than was exacted for the haul from New Orleans to La Grange, the shorter distance point."

In our oral and printed arguments in this case and in both the lower courts we contended that the Atlanta rates were reasonably high in themselves, and that they were the result *not of competition, but of agreement.*

We give below a summary of the grounds upon which we contended before this court and the other courts that the Atlanta rates were reasonably high in and of themselves.

(*a*) Prima facie presumption that rates charged will be reasonably high.

(*b*) This presumption strengthened when rates have been charged for a long period of time, as in the present case.

(*c*) Atlanta rates established by *agreement*. No reason why rates agreed upon should not be reasonably high.

(*d*) Atlanta rates and rates on the same basis to other competitive points, when applied to the bulk of the traffic of the defendants, have proven fairly remunerative.

(*e*) Rates per ton per mile under Atlanta rates much higher than revenue per ton per mile of roads in Southern territory and throughout the United States.

Printed argument filed in this court, pp. 93–106.

It is self-evident that if the Atlanta rates are reasonably high in and of themselves there can be no justification for higher rates for the shorter haul to Lagrange. The ground upon which it is claimed by the carriers that competition justifies lower rates for a longer than a shorter haul is that competition has compelled the carriers to accept unreasonably low rates to the longer-distance points.

10. **The opinion of the circuit court of appeals.**

The only opinion—if it may be called an opinion—delivered by the circuit court of appeals is as follows:

"Considering the opinions of the Supreme Court of the United States in *Interstate Commerce Commission* v. *The Clyde Steamship Company et als.* and *The East Tennessee, Virginia and Georgia Railway Company et als.* v. *The Interstate Commerce Commission*, recently decided, not yet reported, this case is remanded to the circuit court with instructions to set aside its decree, adjudging that the order of the Commission be enforced and dismiss the application made for that purpose, with costs, the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law." (Record, p. 429.)

This court in its opinion infers from the authorities cited by the circuit court of appeals that that court "concluded that the rates charged to Lagrange did not constitute a violation of the third and fourth sections of the act" and "so far as the reasonableness *per se* of the rates was concerned ordered the case to be dismissed without prejudice to further proceedings, because it was of opinion that in the consideration of this question the Commission had been in effect controlled by its finding, held to have been erroneous, that there had been violations of the third and fourth sections of the act."

In the cases cited the Commission held that *it could not consider competition by carriers subject to the act unless set up on application for relief under the proviso to the fourth section.* This court held that ruling to be erroneous, and because of that ruling alone rendered a decree such as was rendered by the circuit court of appeals in the present case.

The Commission avoided any such ruling in the present case, and expressly states that it has given consideration to competition of all kinds and to every matter of defense set up by the defendants.

See petition for rehearing, Record, page 425.

No matter presented to the Commission, either by the pleadings or the testimony before it, can be pointed out to which the Commission did not give full consideration.

To practically remand the case to the Commission under such circumstances, the Commission having considered every matter presented to it, and without the court's giving any consideration whatever to the additional testimony taken in court, will be to in effect render these proceedings interminable, will defeat the requirement of the statute that *justice*

shall be done in these cases "speedily," and will be tantamount to a denial of justice.

Respectfully submitted.

L. A. SHAVER,
Solicitor for the Appellant.

I, L. A. Shaver, counsel for the Interstate Commerce Commission, appellant in the above-stated cause, hereby certify that the foregoing petition for a rehearing is not interposed for delay and that the same is, in my judgment, well founded. This the 27th day of May, 1903.

L. A. SHAVER,
Solicitor for the Appellant.

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